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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ANR PIPELINE COMPANY,

Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
(EXXON CORPORATION, real party in interest),

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION FOR LEAVE TO FILE JOINT BRIEF *AMICI CURIAE* AND JOINT BRIEF *AMICI CURIAE* OF MICHIGAN CONSOLIDATED GAS COMPANY AND MICHIGAN GAS UTILITIES IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE JOINT BRIEF *AMICI CURIAE*

Pursuant to Rule 37.2 of the Rules of the Supreme Court, Michigan Consolidated Gas Company ("MichCon") and Michigan Gas Utilities ("MGU") respectfully move for leave to file the attached brief as *amici curiae* in support of ANR Pipeline Company's ("ANR") petition for a writ of certiorari. The consent of counsel for ANR has been obtained. Counsel for respondent Exxon Corporation (real party in interest) has not consented.

MichCon, a wholly-owned subsidiary of the MCN Corporation, is a natural gas company engaged in the distribution, transmission, and storage of natural gas, and serves more than one million customers through-

out Michigan. MichCon is a sales and transportation customer of ANR.

MGU, a division of UtiliCorp United Inc., is a natural gas distributor operating entirely within Michigan and is a sales and transportation customer of ANR.

The issues presented by this case—whether a producer of natural gas should, in take-or-pay litigation, be given access to the details of a pipeline's past settlements with other producers and the self-critical evaluations performed by the pipeline and submitted to the Federal Energy Regulatory Commission (the "Commission")—affect important interests of MichCon and MGU, as well as the interests of ultimate consumers of natural gas.

Under rules issued by the Commission to address the problem in the natural gas industry attributable to take-or-pay contracts, interstate pipeline companies are entitled to pass through in their rates a portion of the costs incurred in settling take-or-pay claims with producers. Pipelines' customers, such as MichCon and MGU, as well as ultimate consumers of natural gas, thereby bear a portion of the cost of resolving the take-or-pay crisis. Allowing producers access to pipelines' past settlement agreements will, predictably, increase the costs of settlement. These increased costs will be borne in part by pipelines' customers and ultimate consumers of natural gas. The orders of the courts below will frustrate the Commission's policy for resolving the take-or-pay crisis. Accordingly, MichCon and MGU request that the Court grant ANR's petition for a writ of certiorari, and fully review those orders.

As local distribution companies which purchase gas from interstate pipeline companies, MGU and MichCon

have a stake in the outcome of this petition, and have a perspective on the issues raised by the petition that is not represented by either of the parties in the case. For these reasons, MichCon and MGU respectfully request that this Court grant this motion so that they may present their views in the attached brief.

Respectfully submitted,

/s/ Daniel L. Schiffer

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JOINT BRIEF *AMICI CURIAE* OF MICHIGAN CONSOLIDATED GAS COMPANY AND MICHIGAN GAS UTILITIES IN SUPPORT OF PETITIONER

Michigan Consolidated Gas Company ("MichCon") and Michigan Gas Utilities ("MGU") submit this joint brief *amici curiae* in support of the petition for a writ of certiorari filed by petitioner ANR Pipeline Company ("ANR").

INTEREST OF THE AMICI CURIAE

MichCon is a wholly-owned subsidiary of the MCN Corporation, which is an exempt public utility holding company. MichCon is a natural gas company engaged in the distribution, transmission, and storage of natural gas, and serves more than one million customers

throughout Michigan. MichCon is a sales and transportation customer of ANR.

MGU is a division of UtiliCorp United Inc. UtiliCorp United is a combination electric utility and natural gas distribution company supplying electrical power at resale and wholesale in parts of Missouri and West Virginia and distributing natural gas in parts of Iowa, Minnesota, Colorado, Nebraska, Michigan, Missouri, West Virginia, and Kansas. MGU is a natural gas distributor operating entirely within Michigan and is a sales and transportation customer of ANR.

SUMMARY OF THE ARGUMENT

The courts below have ordered ANR, an interstate pipeline company, to disclose to Exxon Corporation ("Exxon"), a natural gas producer, the terms of confidential settlement agreements entered between ANR and other producers in take-or-pay litigation, and self-critical take-or-pay analyses which the pipeline compiled and submitted to the Federal Energy Regulatory Commission (the "Commission") in response to a Commission directive. Requiring production of these documents would lead to higher prices for natural gas for ultimate consumers of natural gas, and would frustrate the Commission's policy for resolving the take-or-pay crisis.

Under rules issued by the Commission to address the problem in the natural gas industry attributable to take-or-pay contracts, interstate pipeline companies are entitled to pass through in their rates a portion of the costs incurred in settling take-or-pay claims with producers. Pipelines' customers, such as MichCon and MGU, as well as ultimate consumers, thereby bear a portion of the cost of resolving the take-or-

pay crisis. Allowing producers access to pipelines' past settlement agreements will, predictably, increase the costs of settlement. These increased costs will be borne in part by pipelines' customers and ultimate consumers of natural gas. MichCon and MGU request that the Court grant ANR's petition for a writ of certiorari, and fully review those orders.

ARGUMENT

The Commission, in addressing the "significant dislocations" in the gas market caused by take-or-pay contracts, *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, 111 S. Ct. 615, 627 (1991), has determined that "there should be an equitable sharing of take-or-pay costs among all segments of the industry, including producers, pipelines, distributors and consumers." "Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-000], Order No. 500, 52 Fed. Reg. 30,334, 30,342 (Aug. 7, 1987).[1] To facilitate this approach the Commission has adopted a policy providing for the apportionment of take-or-pay settlement costs between pipelines and their customers. Order No. 500, 52 Fed. Reg. at 30,342. Under this policy, interstate pipeline companies are entitled to pass through in their rates a portion of the costs incurred in settling take-or-pay claims with producers. Pipelines' customers and ultimate consumers of natural gas thereby bear a portion of the cost of resolving the take-or-pay crisis.

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[1] This Court has recognized the Commission's extensive, ongoing efforts to address the problems caused by take-or-pay contracts. *See Mobil Oil Exploration*, 111 S. Ct. at 627-28.

The Commission has recognized that the success of its effort depends heavily upon the ability of pipeline companies to negotiate settlements on a competitive basis with producers. "Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-000], Order No. 500-H, 54 Fed. Reg. 52,344, 52,359 (Dec. 21, 1989) ("Order 500-H"); *see American Gas Ass'n v. FERC*, 912 F.2d 1496, 1508 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991). Allowing producers access to the details of past settlements entered into by a pipeline will give producers an unfair advantage in their negotiations with the pipelines. The costs of settlements will, predictably, increase. Because pipelines can pass through a significant portion of the cost of these higher settlements to resale customers, the impact of unfairly allowing producers access to this information will be borne in part by pipelines' customers, such as MichCon and MGU, and ultimate consumers of natural gas.

The Commission, which is entrusted with the regulation of the natural gas industry, has expressly rejected a request for disclosure of some of the same information at issue in this case, recognizing:

> There is no doubt that these data and material submitted by the pipelines are sensitive commercial information. Disclosure will . . . cause the pipelines substantial competitive harm in that producers will know the terms of settlements that have already been executed. In addition, such disclosure will harm pipeline ratepayers and consumers because a lessening of the pipelines' bargaining power would result in less favorable settlements for

> the pipelines and the flowthrough of the attendant higher settlement costs to ratepayers and consumers.

"Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-059], Order Denying Release of Data, 50 FERC (CCH) ¶ 61,391, at 62,219 (Mar. 21, 1990).

The rulings by the courts below allowing a producer access to confidential settlement information, if allowed to stand as precedent, will jeopardize the "equitable sharing" of take-or-pay costs envisioned by the Commission. The Commission's efforts to protect gas consumers from excessive gas costs would have the distorted impact of weakening the bargaining position of pipelines, leading to higher gas costs, and discriminating in favor of producers to the detriment of pipelines, local distribution companies, and their customers, the ultimate consumers of natural gas. This Court should review the orders of the courts below to ensure that federal policy on this important issue is not frustrated.

CONCLUSION

For these reasons, MichCon and MGU respectfully request that ANR's petition for a writ of certiorari be granted.

Respectfully submitted,

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